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Labored Law: Bilateralism or Pluralism, Ossification or Reformation

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Labored Law: Bilateralism or Pluralism, Ossification or Reformation?†

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The form of the question reflects extensive study among scholars, limited debate among elected officials, and claims from organized labor and their supporters of "Workers' Rights Under Attack," "Middle Class at Risk," a "Human Rights Crisis," and a "September Massacre."[1] In 1953, "organized labor" ("Labor") represented 35.7% of the private-sector U.S. workforce.[2] Labor's downhill slide to its current 6.9% membership density is due to many factors: a changing workplace, new technologies, generational changes, globalization, employer concern for operating flexibility, burgeoning federal and state employment legislation and regulation, and a host of human and institutional failures.[3]

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1. For representative scholarship, see, e.g., Charles B. Craver, *Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135 (1997); Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223 (2005); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Katherine V.W. Stone, *The Future of Labor and Employment Law in the United States* (UCLA Sch. of Law, Law & Econ Res. Paper Series, Paper No. 08-11, 2008). For representative claims, see, e.g., George Miller, Senior Democratic Member, Comm. on Educ. & the Workforce, U.S. House of Representatives, *Workers' Rights Under Attack by Bush Administration: President Bush's National Labor Relations Board Rolls Back Labor Protections* (July 13, 2006), *available at* http://www.apwu.org/issues-efca/nlrb_report071306.pdf; Press Release, AFL-CIO, Statement by AFL-CIO President John Sweeney on Wilma Liebman Appointment as NLRB Chair (Jan. 26, 2009), *available at* http://www.aflcio.org/mediacenter/prsptm/pr01262009.cfm; Press Release, AFL-CIO, Statement by AFL-CIO President Richard Trumka on Department of Labor Notice of Employee Rights Rule (May 20, 2010), *available at* http://www.aflcio.org/mediacenter/prsptm/pr05202010.cfm.

2. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among Private Sector Workers, 1973–2010*, UNIONSTATS (2011), http://unionstats.gsu.edu/Private%20Sector%20workers.htm; *see also* Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903 (2007); Cynthia L. Estlund, *The Death of Labor Law?* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 06-16, 2006).

3. *Id.*

Organized labor, as we know it, is fighting for its institutional life, to be the sole form of worker voice in an adversarial legal regime, and to recapture a historic density likely unachievable.[4] The reported prospects for a return to higher union densities are dim, reflecting a variety of factors, most notably the changed structure of the economy with employment shifting away from sectors where unions were historically strongest.[5] And, the more competitive an industry, the less likely it can sustain a sizeable union premium.[6] It is unlikely that owners of capital will be indifferent between investing in the union and nonunion sectors, given the union cost premiums and restrictions on operating flexibility.

Despite these many factors and impediments to increasing union density, unions won 68.6% of representation case elections conducted by the National Labor Relations Board (NLRB) in fiscal year 2009.[7] Yet it is the number of victories by whatever means—secret ballot elections or voluntary recognitions—that is the objective. The real question now is whether union density/leverage can be markedly enhanced by calculated changes to NLRB decisional law and through regulatory initiatives given the recent failed effort for legislative relief.[8]

According to interviews of union organizers from a sample of 407 NLRB certification elections during 1998–99, in units of fifty or more eligible voters, plant closings and alleged threats of closings resulted in lower union election win rates.[9] But the unions involved reportedly filed fewer charges with the NLRB because (a) they believed the union would achieve its first contract so filing was unnecessary; (b) they thought the case was not strong enough to win; and (c) they felt that they would lose the unit anyway because of a plant closing, decertification, or inability to get the employer to the bargaining table. .[10] For these reasons, and based on comments of union organizers, card check recognition rather than board elections

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4. *See generally* Andy Stern, *Labor's New Deal*, THE NATION, Apr. 7, 2008, at 26.

5. Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973–1998*, 22 J. LAB. RES. 459, 467 (2001).

6. Barry T. Hirsch, *Reconsidering Union Wage Effects: Surveying New Evidence on an Old Topic* 33 (Inst. for the Stud. of Lab., Discussion Paper Series, Paper No. 795, 2003); Barry T. Hirsch & Edward J. Schumacher, *Private Sector Union Density and the Wage Premium: Past, Present, and Future*, 22 J. LAB. RES. 487, 495 (2001); Richard Vedder & Lowell Gallaway, *The Economic Effects of Labor Unions Revisited*, 23 J. LAB. RES. 105, 128 (2002); Michael L. Wachter, *Judging Unions' Future Using a Historical Perspective: The Public Policy Choice Between Competition and Unionization*, 24 J. LAB. RES. 339 (2003).

7. NLRB, SEVENTY FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 125–27 tbl.13 (2009).

8. *See* United Brotherhood of Carpenters and Joiners, Local Union No. 1506, 355 N.L.R.B. 159 (2010); Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 509, 111th Cong. (2009); NLRB: Notice of Proposed Rulemaking, 76 Fed. Reg. 36812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03).

9. Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing. Part II: First Contract Supplement*, RES. STUDY & REP. (June 1, 2001), at 12–17 (submitted to the U.S. Trade Deficit Rev. Comm'n, June 1, 2001).

10. *Id.* at 14.

and first contract arbitration rather than collective bargaining have been recommended.[11]

Another "studied" attack on the NLRB's undermining of employee rights to organize evaluated sixty-two Chicago-area campaigns in 2002 and interviews with twenty-five lead organizers and eleven anonymous employees.[12] The findings reported that 30% of the employers allegedly fired workers for engaging in union activities, 49% threatened to close or relocate, and 82% used consultants to aid the employers' fight against union activities.[13] Reportedly, unions were hesitant to file charges where evidence may be insufficient, the election date may be delayed, and make-whole remedies or 10(j) injunctive relief[14] may be lacking.[15]

Organized labor and its academy have forever argued that the 1935 National Labor Relations Act (NLRA), as amended,[16] made the choice of "union yes" insulated from employer speech because the union "election" is not a civic election and, therefore, employers have no right or reason to comment or participate.[17] Labor and their advocates have long called for changes to the NLRA and refused to acknowledge or accept the 1947 Taft-Hartley amendment, section 8(c),[18] which specifically addresses and implicitly endorses the right of employers, in addition to labor organizations, to express views, argument, and opinion in any form. But, fundamentally, labor must acknowledge that

> [t]he decision whether or not to support a union depends fundamentally on three questions: Are the conditions within the plant unsatisfactory? To what extent can the union improve on these conditions? Will representation by the union bring countervailing disadvantages as a result of dues payments, strikes, or bitterness within the plant?[19]

And, organized labor and its supporters must admit that "free choice" necessarily requires informed choice and the absence of pressure, promises, threats, or coercion. Card checks cannot and do not guarantee or ensure either free or informed choice.[20]

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11. *See id.* at 57–58.

12. *See* CHIRAG MEHTA & NIK THEODORE, CTR. FOR URB. ECON. DEV., UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 27 (2005).

13. *Id.* at 5.

14. 29 U.S.C. § 10(j) (2006) authorizes the NLRB to petition any district court of the United States to seek temporary relief or a restraining order.

15. MEHTA & THEODORE, *supra* note 12, at 17.

16. 29 U.S.C. §§ 151–69 (2006); Labor Management Relations Act of 1947, 29 U.S.C. §§ 141–88 (1947); Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401–531 (1959).

17. *See* GORDON LAFER, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NATIONAL LABOR RELATIONS BOARD ELECTIONS (2007).

18. 29 U.S.C. § 158(c) (2006).

19. Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 49 (1964).

20. Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia 1978–1998*, 57 INDUS. & LAB. REL. REV. 493,

Given employers' property rights enabling their onsite communication with their employees, including "captive" audience meetings, unions counter with home visits and stealth campaigns to prevent or delay employer awareness of union organizing.[21] Covert campaigning enables unions to be the sole provider of information, or at least to minimize employer "air time," to enhance success in obtaining signed cards enabling voluntary recognition or election petition filing with the NLRB. The proposed Employee Free Choice Act of 2009 (EFCA) would have effectively stripped employers of their statutory right of speech guaranteeing uninformed employee choice; ensured at least some degree of intrusion, coercion, or even threats to sign a card; and eliminated any secret ballot election by making union recognition mandatory when presented with a card majority.[22] Adding to the significance of organized labor's tactics to capture representative status by controlling information is the NLRA's antiquated architecture offering but a single option to allow *any* negotiation or dealing between employees and employers regarding wages, hours, and working conditions—third-party majority representation or no bargaining, no dealing, nothing.[23]

But even with majority representation, does labor deliver? Unions argue that achieving a first contract is difficult. Impediments to achieving first contracts are NLRB delays in resolving post-election objections and challenges, post-election employer discrimination, employer refusals to bargain, prolonged hard bargaining, and strikes.[24] Notably, strikes played a role in 23% of negotiations ultimately resulting in agreement and in 26% of failed negotiations.[25] And, the overwhelming majority of union-represented employees never participated in any election regarding choice of union representative or whether to be represented at all.[26]

Prompting much debate regarding first contract negotiations is Weiler's study testing his hypothesis on the negative effect of deficiencies in the law.[27] In a review of 271 election certifications in units of 100 employees or more between 1979 and 1981, Weiler found 172, or 63%, achieved a first contract.[28] Weiler rejects interest arbitration as a remedy for bargaining impasse because it collides with the principle of free collective bargaining, but he would consider it as a special remedy for failure to bargain.[29] Weiler acknowledges the Supreme Court's emphasis on the fundamental policy of freedom of contract and the Act's admonition that agreement to a proposal or the making of a concession is not required.[30]

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498 (2004).

21. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).

22. S. 560, 111th Cong. (2009); H.R. 1409, 111th Cong. (2009).

23. 29 U.S.C. §§ 152(2), 158(a)(2) (2006); Electromation, Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); E.I. DuPont & Co., 311 N.L.R.B. 893 (1993).

24. William N. Cooke, *The Failure to Negotiate First Contracts: Determinants and Policy Implications*, 38 INDUS. & LAB. REL. REV. 163, 176 (1985); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 377, 404, 408–10 (1984).

25. Cooke, *supra* note 24.

26. 157 CONG. REC. S5265 (daily ed. Aug. 2, 2011) (statement of Sen. Orrin Hatch).

27. Weiler, *supra* note 24.

28. *Id.*at 354 n.5.

29. *Id.* at 372–405.

30. *Id.* at 358, 362.

In response to Weiler, LaLonde and Meltzer argue that estimates of employers' refusals to bargain first contracts are too high and reject the "rogue employer" thesis.[31] Their research of random samples of Board decisions from 1955 and 1980 disputes the NLRB General Counsel's 1978 claim that 90% of 29 U.S.C. § 8(a)(3) charges arise out of organizing campaigns and that one in twenty union supporters are discharged during a campaign.[32]

The question of whether employee rights are protected relative to initial collective agreements implicitly suggests that failure at obtaining first contracts violates employee rights. But the NLRA does not guarantee or mandate contract outcomes:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.[33]

Additional remedies of the kind that were contemplated in the EFCA would require amending section 10(c) of the NLRA and raise due process concerns given the current absence of NLRB pre-hearing discovery.[34] And, rectifying such due process issues will inevitably lead to further delays in dispute resolution, election scheduling, or first contracts.[35] The recent trend for states to intrude into the arena of labor law is also problematic, raising the specter of conflicting rigidities, inflexibilities, and costs imposed on employers and market competitiveness.[36]

To do anything to force first contracts, including interest arbitration, contravenes the NLRA and destroys freedom of contract. It's hard to imagine such a revolutionary outcome in civil law. Even Weiler, a pro-Canadian labor law admirer, acknowledges that "if the cause of union decline is rejection by American workers of the institution, there is nothing that the law can or should do about that verdict."[37]

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31. Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 959, 990–1003 (1991).

32. *Id.* at 986.

33. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1402 (1958) (quoting 79 CONG. REC. 7660 (statement of Sen. Walsh)).

34. *See* 29 U.S.C. § 160(c) (2006). *See generally* JON O. SHIMABUKURO, CONG. RES. SERV., RS21887, THE EMPLOYEE FREE CHOICE ACT (2011).

35. Letter from Karen R. Harned, Executive Director, National Federation of Independent Business Small Business Legal Center, to Lester A. Heltzer, Executive Secretary, National Labor Relations Board 5 (August 22, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=NLRB-2011-0002-28124; *see also* NLRB: Notice of Proposed Rulemaking, 76 Fed. Reg. 36812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03) (seriously compromising due process in attempting to conduct elections "speedily").

36. *See* Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008).

37. Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1018 (1991). *Contra*, Dau-Schmidt, *supra* note 1.

"The decline of unions is largely due to economic pressures that the law can hardly control or withstand."[38] The explanation for union decline "lies primarily in natural market forces: structural changes in the American economy, increased domestic and foreign competition; and, yes, even increased employee opposition to private unionization."[39] And, internal bureaucracies and politics add to the mix of successes and failures as well.[40]

The administration of the NLRA rests with the NLRB.[41] Reflecting, in part, organized labor's decline, caseload has atrophied over time. NLRB members issued 2606 decisions in FY 1981 but only 368 decisions in FY 2011.[42] During FY 1981, 55,897 cases were filed with the NLRB.[43] The NLRB received 25,022 cases in FY 2011.[44] The NLRB's funding for FY 1981 was $118,488,000 and $284,400,000 for FY 2011 (or $113,760,000 in 1981 constant dollars).[45] Despite a 55% decline in case intake and an 85.9% decline in case output, agency funding in constant dollars declined only 39.9%, and the NLRB continues to maintain fifty-one regional and

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38. Keith N. Hylton, *Law and the Future of Organized Labor in America* 10 (Boston Univ. Sch. of Law, Working Paper Series, Law and Econ., Working Paper No. 03-14, 2003).

39. Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. CHI. L. REV. 681, 682 (1992) (emphasis omitted).

40. *See, e.g.*, *Bob King and UAW Leadership Undermine R&F Union Power at the Big Three*, FACTS FOR WORKING PEOPLE (Sept. 22, 2011), http://weknowwhatsup.blogspot.com/2011/09/bob-king-and-uaw-leadership-undermine.html; Steve Early, *Whither Change to Win?*, IN THESE TIMES (Oct. 10, 2011, 1:20 PM), http://www.inthesetimes.com/working/entry/12074/whither_change_to_win/; Thomas B. Edsall, *Two Top Unions Split from AFL–CIO: Others Are Expected to Follow Teamsters*, WASH. POST, July 25, 2005, at A1; Chris Kutalik, *What Does the AFL–CIO Split Mean?*," LABORNOTES (Sept. 1, 2005 12:00 AM), http://labornotes.org/node/776; David Macary, *Back Up the Aisle? AFL–CIO and Change to Win in "Re-Wed" Talks*, COUNTERPUNCH (Feb. 6–8, 2009), http://www.counterpunch.org/2009/02/06/afl-cio-and-change-to-win-in-quot-re-wed-quot-talks/; David Moberg, *Has the Change Led to Wins?: Not Yet, but Organizers from the Seven Unions that Split from the AFL-CIO Have Big Plans*, IN THESE TIMES (Oct. 24, 2007), http://www.inthesetimes.com/article/3379/has_the_change_led_to_wins/; Ben Smith, *UNITE HERE Talks Collapse*, POLITICO (Apr. 30, 2009), http://www.politico.com/blogs/bensmith/0409/UNITE_HERE_talks_collapse.html; Ben Smith, *SEIU Bid on UNITE HERE*, POLITICO (Feb. 9, 2009), http://www.politico.com/blogs/bensmith/0209/SEIU_bid_on_UNITE_HERE.html?showall; *UAW Leadership Picks King Next Union President*, REUTERS (Dec. 16, 2009, 7:14 PM), http://www.reuters.com/article/2009/12/17/uaw-king-idUSN1611413620091217.

41. 29 U.S.C. §§ 153–56 (2006).

42. NLRB, FORTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 19 (1981); NLRB, FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 3 (2011).

43. NLRB, FORTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 1 (1981).

44. NLRB, FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 44 (2011).

45. GEN. ACCT. OFFICE, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES, GAO/HRD-82-80 29 (1982); NLRB, FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 73 (2011); *CPI Calculator*, U.S. DEP'T OF LABOR, BUREAU OF STAT., http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1&year1=1981&year2=2011.

subregional offices and one headquarters office.[46] Much has been written over the years regarding NLRB delay in decision making and infamous decisional flip-flopping regarding statutory interpretation challenging judicial deference and challenging alleged agency "expertise."[47] As with other federal employment law statutory structures, Congress should consider channeling NLRA disputes to an Article III court or even create a specialized Article III court for all federal workplace law issues.

According to one critic, "labor laws . . . have become nearly irrelevant[] to the vast majority of private-sector American workers."[48] Whether by globalization, structural economic change, increased employer resistance given decreased union density and corresponding economic leverage, unions' own complacency, or traditional adversarial unionism, 92% of the private-sector workforce is not part of the legislated structure for industrial peace.[49]

Unions cannot survive if their employer "hosts" fail, yet employers can thrive without unions.[50] Given this economic reality for standoff, must American workers be left with "It is what it is . . . . Take it or leave it"? In this day and time, should the choice be only full-fledged majority representation in an adversarial top-down paradigm or no collective voice of any other kind?[51] The NLRA's section 8(a)(2) prohibition on "any organization of any kind" which "deal[s] with" employers denies millions of fellow citizens a constructive voice at work.[52]

> Traditional union governance regularizes and codifies worker tasks within a top-down command structure. In contrast, modern workplaces typically require interaction and two-way communications between workers and supervisors, accompanied by the use of bottom-up worker and managerial discretion that takes advantage of site-specific information.

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46. NLRB, FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 6 (2011).

47. *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Estlund, *supra* note 2; Estlund, *supra* note 1; Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); David L. Gregory, *The National Labor Relations Board and the Politics of Labor Law*, 27 B.C. L. REV. 39 (1985); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000).

48. Estlund, *supra* note 1, at 1528.

49. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among Private Sector Workers, 1973–2010*, UNIONSTATS (2011), http://unionstats.gsu.edu/Private%20Sector%20workers.htm.

50. Estlund, *supra* note 1, at 1543.

51. *Id.*; *see also* Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?* (Inst. for the Study of Labor, Discussion Paper Series, Paper No. 2362, 2006).

52. 29 U.S.C. § 152(a)(5); *see also*, Electromation, Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); E.I. DuPont & Co., 311 N.L.R.B. 893 (1993).

> In contemporary workplaces, job hierarchies are often not clear-cut and worker decision-making is essential at most levels.[53]

Traditional unionism under the NLRA serves as bargaining leverage in an adversarial model. Even accepting the questionable assertion that 53% of the nonunion workforce wants traditional unionism, 47% are left with nothing under the NLRA.[54] Certainly the 90% of the private workforce who are not unionized are not well served by the current system offering the choice of confrontation or nothing but rare, random, and legally limited opportunities for watered-down worker voice and participation.[55] It is this *absence* of *any* lawful, robust, employee voice alternative to a seventy-six-year-old third-party-only option that truly restricts human rights in the United States.[56]

The Dunlop Commission's first goal for the twenty-first century workplace was to "[e]xpand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions."[57] Labor policy should be modernized to offer workers/employees/colleagues/citizens what they want and what the economy needs.[58] The Teamwork for Employees and Managers Act[59] would have made a positive adjustment. While good for some, we must remember that "[t]he dramatically reduced role played by unions and collective bargaining in the U.S. private economy is hardly attributable solely or even primarily to the workings of the legal regime."[60] Yes, workers' rights are protected in the NLRB representation election process. And yes, workers' rights are protected during initial contract bargaining recognizing the fundamental policy of the freedom

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53. Hirsch & Hirsch, *supra* note 51, at 9 (citations omitted). *See generally* Bruce E. Kaufman, *The Two Faces of Unionism: Implications for Union Growth*, *in* THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 61 (Phanindra V. Wunnava ed., 2004).

54. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999); Richard B. Freeman, *Do Workers Still Want Unions? More than Ever* 2 (Econ. Pol'y Inst., EPI Briefing Paper, Paper No. 182, 2007).

55. Hirsch & Schumacher, *supra* note 6, at 497–99.

56. AFL-CIO, COMPLAINT AGAINST THE GOVERNMENT OF THE UNITED STATES PRESENTED BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) REPORT NO. 349, CASE NO. 2524 (2008), *available at*http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=4787&chapter=3&query=%28%28United+States%29%29+%40ref&highlight=&querytype=bool&context=0; LANCE A. COMPA, HUMAN RIGHTS WATCH, A STRANGE CASE: VIOLATIONS OF WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES BY EUROPEAN MULTINATIONAL CORPORATIONS 11–12 (2010); LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 19–43 (2000).

57. U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 20 (1994).

58. Thomas A. Kochan, *Updating American Labor Law: Taking Advantage of a Window of Opportunity*, 28 COMP. LAB. L. & POL'Y J. 101, 113 (2007).

59. S. 295, 104th Cong. (1995).

60. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 223 (2005).

of contract. However, "[t]he current legal regime is based on a model of the employment relationship that poorly reflects modern conditions . . . . [T]he focus of legislative efforts should be on lifting existing restrictions that limit representational options and encourage adversarial contests."[61]

Federal labor law must be supplemented to also embrace a modern "participatory self-governance" model allowing employees and employers to discuss any and all matters of interest.[62] Today's workplace should be "allowed" to engage employees and take advantage of mediation, arbitration, and expanded corporate social responsibility and governance, and be on equal footing with the other option-exclusive representation under the NLRA's adversarial or confrontational regime.[63] Let workers/employees/colleagues/citizens decide which option is best for them. And, undoubtedly, a century from now further remodeling with additional options will be required.

It is time to decide. Do we keep what we have, refine what we have, or expand our options? Adjustments to federal labor laws are long overdue. For example:

> 1. Amend NLRA section 8(a)(2) by inserting:
> "Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for any employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor

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61. Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, REGULATION, Winter 1995, at 28, 37.

62. *See* Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. &POL'Y J. 313 (2007); Estlund, *supra* note 2, at 6.14; Estlund, *supra* note 1, at 1603; Cynthia Estlund, *A Return to Governance in the Law of the Workplace (and the Question of Worker Participation)* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-39, 2010).

63. *See National Labor Relations Board Representation Elections and Initial Collective Bargaining Agreements: Safeguarding Workers' Rights?: Hearing Before a Subcomm. of the Comm. on Appropriation of the U.S. S.*,110th Cong. 56–64 (2008) (statement of John N. Raudabaugh, Partner, Baker & McKenzie, LLP); *H.R. 4343, Secret Ballot Protection Act of 2004: Hearing Before the Subcomm. on Employer-Employee Relations of the Comm. on Education and the Workforce, U.S. H.R.*, 108th Cong. 6–12 (2004) (statement of John N. Raudabaugh, Partner, Butzel Long); John N. Raudabaugh, Electromation*: An Opportunity Lost or Just Postponed? in* NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 513 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000); John N. Raudabaugh, Partner, Baker & McKenzie LLP, Statement Before the Senate Republican Conference (July 21, 2008); John Neil Raudabaugh, *Perspectives on Labor Law Reform*, Presentation to the Industrial Relations Research Association Commemorating the 1944 Declaration of Philadelphia (Apr. 21, 1994).

organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply," and by adding a new sub-section (4) to read: "Nothing in this Act shall affect employee rights and responsibilities contained in provisions other than Section 8(a)(2) of the National Labor Relations Act, as amended."[64]

This proposal is key to expanding voice and participatory options.

2. Amend NLRA Section 8(b)(1) by inserting "interfere with" to read: "It shall be an unfair labor practice for a labor organization or its agents to *interfere with*, restrain, or coerce (A) employees in the exercise of the rights guaranteed in section 157. . . ."

This proposal would finally equate restrictions on labor organizations with the same longstanding restrictions against employers. It is critical to acknowledge that in 2008, there were just over 29.5 million businesses in the United States of which businesses with fewer than 500 employees comprised 99.9% of the 29.5 million businesses.[65] International labor organizations and their affiliates are large institutions employing hundreds of employees, managing hundreds of millions of dollars, and maintaining skilled personnel and legal departments. Labor organizations are in the business of organizing and representing employees and should be subject to the same legal restraints as employers.

3. Amend NLRA Section 9(b) by adding "prior to an election" after "in each case."

This proposal would protect due process rights of employers and unions and employees.

4. Amend NLRA Section 9(c) by inserting "of 14 days in advance" following "appropriate hearing upon due notice", "and a review of post-hearing appeals" following "the record of such hearing" and at the end of sub-section, "No election shall be conducted less than 40 calendar days following the filing of an election petition. The employer shall provide the Board a list of employee names and home addresses of all eligible voters within seven (7) days following the Board's determination of the appropriate unit or following any agreement between the employer and the labor organization regarding the eligible voters," a new subsection (6)(A) to read:

"No election shall take place after the filing of any petition unless and until (i) a hearing is conducted before a qualified hearing officer in accordance with due process on any and all material, factual issues

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64. Teamwork for Employees and Managers Act of 1997, H.R. 634, 105th Cong. (1997).

65. *How Many Small Businesses Are There?*, U.S. SMALL BUS. ADMIN., www.sba.gov/advocacy/7495/8425.

regarding jurisdiction, statutory coverage, appropriate unit, unit inclusion or exclusion, or eligibility of individuals; and (ii) the issues are resolved by a Regional Director, subject to appeal and review, or by the Board."

A new subsection (6)(B) to read:

"No election results shall be final and no labor organization shall be certified as the bargaining representative of the employees in an appropriate unit unless and until the Board has ruled on (i) each pre-election issue not resolved before the election; and (ii) the Board conducts a hearing in accordance with due process and resolves each issue pertaining to the conduct or results of the election."

This proposal would ensure due process in representation case procedures contrary to the NLRB's current proposed rule.[66]

5. Amend NLRA Section 9(e) by adding a new subsection (3) to read:
"Every thirty-six (36) months following initial certification of a labor organization as the exclusive representative of employees in an appropriate bargaining unit, the Board shall conduct a secret ballot election among such employees to determine whether a majority desire to continue to be represented by such labor organization. The election shall be conducted without regard to the pendency of any unfair labor practice charge against the employer and the Board shall rule on any objections to the election. If a majority of votes cast reject continuing representation by the labor organization, the Board shall certify the results of the election.

This proposal would provide an interference-free method for unit represented employees who never participated in any vote or card signing or voluntary recognition process to select and designate their representative.

6. Amend NLRA Section 13 by adding:
"provided no strike shall commence without a majority secret ballot vote of all employees affected to be conducted by the American Arbitration Association or a comparable, neutral, private organization. The cost of the election shall be borne by the labor organization and the Board shall rule on any objections to the election."

This proposal would ensure that all represented employees have the right to vote on strike action.

7. Amend LMRDA Section 101(a)(1) by inserting at the end:
"Every employee in a bargaining unit represented by a labor organization shall have the same right as members to vote by secret ballot regarding whether to ratify a collective bargaining agreement

66. NLRB: Notice of Proposed Rulemaking, 76 Fed. Reg. 36812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03).

with or to engage in a strike or refusal to work of any kind against their employer."

This proposal would ensure all employees represented by a labor organization have the right to vote on strike action and whether to ratify a negotiated bargaining agreement.

8. Amend LMRDA Section 101(a)(3) by inserting:
"No member's dues, fees, or assessments or other contributions shall be used or contributed to any person, organization, or entity for any purpose not germane to the union's collective bargaining or contract administration functions unless the member authorizes such expenditure in writing."

This proposal would ensure that no employee's dues and fees and assessments paid to the labor organization would be used for any purposes other than local bargaining and grievance or arbitration representation without the express, written approval of the employee.

9. Amend LMRDA Section 610 by inserting new sub-sections (b) and (c) to read:
"(b) It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any person for the purpose of obtaining from any person any right to represent employees or any compensation or other term or condition of employment. Any person who willfully violates this sub-section shall be fined not more than $100,000 or imprisoned for not more than ten (10) years, or both.
(c) The lawfulness of a labor organization's objectives does not remove or exempt conduct by the labor organization or its agents that otherwise constitutes extortion as defined by 18 U.S.C. Section 1951(b)(2) from the definition of extortion."

This proposal strengthens prohibitions against any use of force or violence or threat thereof for achieving lawful or unlawful objectives thereby resolving the undercutting of the Hobbs Act by the decision in *United States v. Enmons*, 410 U.S. 396 (1973).

CONCLUSION

Additional study is unnecessary. As to what institution will be effective "to minimize the randomness of fortune of democratic capitalism . . . [and] . . . will stand effectively as a counterweight in our democracy to the growing political influence of corporations[,]" the answer is you, me, and our fellow worker/employee/colleague/citizen if we are permitted to do so.[67] Recognizing the wide array of workplaces, jobs, age groups, educational backgrounds, and

67. Wilma B. Liebman, *Labor Law Inside Out*, 11 WORKING USA J. LAB. & SOC'Y 9, 20 (2008).

globalization, among other variables, old New Deal third-party majority representation "voice" or no voice at all regarding wages, hours of work, and working conditions is untenable. Keep, if you will, the industrial-age, combative, third-party-union-voice form with its companion, the vacillating adjudication of labor's politicized "expert" Board, or, better yet, replace it with an Article III workplace law court, but proceed now to legalize and embrace an array of creative voice forms and governance models, allow and promote employee engagement, and utilize dispute resolution when required.

One option only, and a well-worn one at that, misses the mark. Yes, this too shall pass,[68] but only if we get on with it.

68. Gregory, *supra* note 47, at 52.